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IN THE

Supreme Court of The United States

No. 806...

UNITED SERVICES AUTOMOBILE ASSOCIATION,
Petitioner

VS.

UNITED STATES OF AMERICA, ROBERT H. BUSCH and MRS. MARGUERITE BUSCH,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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UNITED STATES OF AMERICA, ROBERT H. BUSCH and MRS. MARGUERITE BUSCH,
Respondents

Petition for Writ of Certiorari

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Now comes UNITED SERVICES AUTOMOBILE ASSOCIATION, hereinafter referred to as Petitioner, and asks that this Honorable Court issue its writ of certiorari to the Fifth United States Circuit Court of Appeals in order that its judgment in No. 29031, styled UNITED STATES OF AMERICA, ROBERT H. BUSCH and MRS. MARGUERITE BUSCH, Plaintiffs-Appellees, versus UNITED SERVICES AUTOMOBILE ASSOCIATION, Defendant-Appellant, dated July 9, 1970 may be reviewed by the Court.

STATEMENT OF THE NATURE AND RESULT OF SAID CASE

This is a suit between the Federal Government of the United States and an insurance company known as United

Services Automobile Association wherein the Government asserts rights under a contract of insurance issued by Petitioner to one of its insureds.

The Federal District Court for the Western District of Texas, Judge Guinn presiding, granted the Government's motion for summary judgment, which was affirmed by the United States Fifth Circuit Court of Appeals in a per curiam opinion, which held that the United States Government was a third party beneficiary under the contract of insurance issued by Petitioner.

Jurisdiction

The Supreme Court of the United States has jurisdiction over this case since in the instant case the Fifth Circuit Court of Appeals has rendered a decision which is in conflict with another court of appeals on the same matter and has decided an important state question in a way which is in conflict with the law of the State of Texas and as a result has decided an important question which involves the contractual rights of the Federal Government and the contractual rights of the insurance industry, which in turn produces a substantial effect on the population of the United States, and in particular all active and retired members of the armed forces of this Country.

Opinion Below

The opinion of the United States Fifth Circuit Court of Appeals is unreported; however, a copy of said opinion is set forth at page 1 of Appendix infra.

Statement of the Case

I. Question Presented.

There is only one decisive question presented to this Honorable Court; and that is whether or not under the facts of this case the Federal Government of the United States is a

proper third party beneficiary under the medical payments clause of the insurance contract in suit.

II. Facts.

It is the strict policy of Petitioner insurance company to insure only those persons who hold the position of an officer in the armed forces of the United States. On December 12, 1966, Petitioner in Orlando, Florida issued a contract of insurance to Robert A. Busch, Major, USAF. The policy period was to continue for one year from date of issue. The policy provided for medical payments coverage with a limit of $5,000.00 to each person. The insurer agreed to pay all reasonable expenses incurred within one year from the date of accident for necessary medical, surgical, X-ray and dental services, including prosthetic devices, and necessary ambulance, hospital, professional nursing and funeral services to or for the named insured and each relative who should sustain bodily injury, sickness or disease, including death resulting therefrom, caused by accident, e.g., through being struck by an automobile. On April 10, 1967, William J. Busch, minor son of Robert H. Busch and Marguerite Busch, was struck by an automobile in San Antonio, Texas.

The child was treated at Brooke General Hospital, Fort Sam Houston, Texas, on specified occasions following the accident both as a patient therein and as an out-patient thereof. The statements of costs of the hospital in the total amount of $2,223.75 represented reasonable fees for all such medical treatment. The medical treatment rendered by the government was necessary because of the bodily injuries received by the injured person in the accident.

The medical services in question were rendered without cost or obligation to the injured person pursuant to USCA, Title 10, Armed Forces, subsection (a), Section 1076, p. 389, and Section 1077, p. 392, as amended.

Following discharge of the patient by Brooke General Hospital and a refusal to pay by Petitioner, both the United States and Robert H. Busch filed suit against Petitioner in the United States District Court for the Western District of Texas seeking to recover the value of hospitalization, plus twelve (12%) percent thereof as penalty, plus attorneys fees. Summary judgment was entered by the trial court denying Busch a recovery, but awarding the United States a recovery from Petitioner in the sum of $2,223.75, plus twelve (12%) percent penalty in the amount of $266.85, plus attorneys fees in the amount of $750.00, together with costs. In a per curiam opinion, the United States Fifth Circuit Court of Appeals affirmed the judgment of the trial court.

ARGUMENT AND AUTHORITIES

The medical payments clause of the automobile policy in question provided, insofar as is pertinent to this case, that Petitioner USAA contracted with the insured as follows:

> "Part II — Expenses for Medical Services
>
> "Coverage C. Medical Payments. To pay all reasonable expenses incurred within one year from the date of accident for necessary medical . . . services . . .:
>
> "Division 1. To or for the named insured and each relative who sustains bodily injury caused by accident,
> ***
>
> "(c) through being struck by an automobile . . ."

There is no dispute but what the minor sustained injuries and was a beneficiary under the policy, subject to the conditions, exclusions and limitations declared therein.

INSURED DID NOT INCUR AN EXPENSE

The Petitioner's contention is that United States has not alleged or proven a cause of action entitling it to recover under the medical payment coverage clause quoted because, first, the insured, Mayor Busch, never incurred the medical expenses and costs sought to be recovered by the United States and as there was never an obligation for Busch to personally pay for such medical services, and second, that it was never at any time contemplated that the United States was intended to be an insured either directly or indirectly as a third party beneficiary and, third, since Major Busch could not recover, the United States should not be permitted to assume a position superior to that of the original insured.

U.S.C.A., Title 10, Armed Forces, Section 1076, subsection (a) provides that a dependent of a member of a uniformed service who is on active duty for more than thirty days is entitled, upon request, to certain medical and dental care. Section 1078 thereof provides that fair charges for such medical and dental care can be made by the Secretary of Defense. The costs of medical care included in plaintiffs' pleadings and sought to be recovered by United States were not pled nor proven to be charges that were made by the Secretary of Defense against Busch and not paid by Busch; nor were such costs shown to be anything other than what was pled, to-wit, the value of services rendered and not chargeable against Busch as a debt owing United States. If there were any charges made against Busch under the law, then USAA paid Busch. It is this fact that leads USAA to assert its contention that none of the medical expenses in question were ever incurred, because "incurred" has generally, and in connection with medical payments clauses in insurance policies, been held to mean the incurring of a legal debt or liability.

Under the policy in question the insurer nowhere agrees to pay medical expenses incurred by an unidentified third party "for" the insured. Under "coverage C" the insurer agrees to pay (1) all reasonable expenses (2) incurred (3) within year from the date of the accident (4) for medical etc. services. In the two divisions under "coverage C" the policy sets forth "to" whom or "for" whom the insurer agrees to so pay, one of which would be a relative who is injured by being struck by an automobile as in the case at hand, and nowhere under "coverage C" does the insurer agree to pay medical expenses incurred by any person or entity other than those specifically designated under the medical payments provision of the contract.

It is so clear that it should not be disputed that there are certain conditions precedent to any obligation of Petitioner. First of all, the expenses must be reasonable, secondly, they must be incurred and, thirdly, they must be incurred within a period of one year from the date of the accident.

It is not contended by Petitioner that the charges were not reasonable; however, it is most strongly urged that the second condition was not met, i.e., the expenses were not incurred within the language and meaning of the contract. Then once it is established that the aforementioned conditions have been met, coverage "C", subdivision "1" becomes material, i.e., to pay to said insured or such relative or for said insured or such relative at his direction.

To hold otherwise would be to force the parties into a contract which neither intended. This is particularly true since if it had been the intention to pay expenses incurred by the government then the net rates charged for said coverage would most surely have been higher.

It is immaterial whether the law of Texas or Florida, the

state where the policy was issued, is applied in this case as both states fall in line with the majority of opinions construing the clause in question and more particularly the word "incurred" as meaning the creating of a legal liability or debt by the insured.

In *Reliance Mutual Life Insurance Company of Illinois vs. Booher*, 166 So2d 222, (Fla. District Ct. of App. 1st Dist. 1964), the Court defined "incur", when presented with a medical payments clause essentially the same as the clause in question and with the question of whether medical expenses were incurred within 52 weeks from the date of an injury, as follows:

> "We find that the words 'provided that such expense shall be incurred within 52 weeks from the date of such injury' are clear and unambiguous. 'Incur' is defined by Webster as follows: 'To meet or fall in with, as something inconvenient or harmful; become liable or subject to; to bring down upon one-self; as, to INCUR debt, danger, displeasure, penalty, etc.' As used in the insurance policy here involved, the words contained in the proviso mean that the *insured must have actually paid or must have become liable for the payment of such expense* within 52 weeks from the date of injury which necessitated the expense." [emphasis supplied]

The word "incur", as used in the clause in question, has been similarly defined by Texas Courts. In *American Indemnity Co. vs. Olesijuk*, 353 SW 2d 71, 72 (Tex. Civ. App. San Antonio, 1962, writ dism'd) it was held:

> "The word 'incur' is a word of common usage and meaning. * * * The word means to become liable to or subject to, 'to bring on', 'occasion', 'cause', or 'become liable or subject to through one's own action; bring upon onese!f' as to incur liabilities or penalties.' "

In accord are *U.S. v. Cocke*, 399 F.2d 433 (5th Cir. 1968) (incurred similarly defined in income tax case); *Stern-*

Sledgman-Prins Co. v. C.I.R., 79 F.2d 289 (8th Cir. 1935); *Bauer Bros. Co. v. C.I.R.*, 46 F.2d 874 (6th Cir. 1931); *Marroquin v. Trinity Universal Ins. Co.*, 394 SW2d 246 (Tex. Civ. App.—Ft. Worth, 1965 no writ hist.); and *Maryland Casualty Co. v. Thomas*, 289 SW 2d 652 (Tex. Civ. App. — Amarillo, 1956 writ ref. n.r.e.). *Marroquin* and *Thomas* similarly defined incurred in connection with a medical payments clause identical to the one in question.

There are a sufficient number of Florida and Texas cases holding that neither an insured nor the United States can recover for medical services rendered pursuant to a statutory obligation of the United States government to justify Petitioner stating unequivocably to this Court that the majority rule is that the word "incurred", as used in medical payments coverage clauses, simply means that the *insured* must become legally obligated to pay for the medical expenses before the insurer is liable to any person or entity under such coverage.

The Supreme Courts of several jurisdictions have had occasion to construe a similar medical payments clause under facts essentially the same as those before this court.

In *Gordon v. Fidelity and Casualty Co. of New York*, 120 SE 2d 509, 512, 513 (Sup. Ct. of So. Carolina, 1961) the insured, a soldier, sought to recover the value of free medical care rendered by the Army at Fort Jackson, South Carolina, for treatment of injuries received while driving a motor scooter. The cause of action was multiple in that a recovery was sought under a fraud and deceit theory and under an automobile policy, the medical payments clause of which was identical to the one before this court. The insured was denied a recovery on both theories and the court in disposing of the cause of action on the medical payments coverage as a matter of law said:

"The liability of the insurer for medical expenses under such a provision depends upon the construction of the particular language used in the contract."

***

"Here, the appellant agreed 'to pay all reasonable expense incurred' for necessary medical and surgical service. There is no uncertainty or ambiguity in the language of the policy. It is too plain to call for judicial construction. The words used must be taken in the plan and ordinary sense in which they are generally used and understood."

***

" 'Incur emphasizes the idea of liability***' ".

***

". . . [T]he [insurer] was not liable to the [insured] for the reasonable cost of his hospitalization, because the appellant had limited its liability to pay only 'all reasonable expenses *incurred' by the* [*insured*]. There being no obligation on the part of the [insured] to pay for the hospitalization he received at Fort Jackson hospital, he 'incurred' no expense within the meaning of the provision of the policy of insurance issued by the appellant."

The plaintiff in *Lefebvre v. Government Employees Insurance Company*, 259 A2d 133, (N.H. Supreme Ct.—1969) was a military serviceman and sued to recover, under a medical payments clause apparently identical to the one in the instant case, the value of the medical services rendered to his wife by the United States under USCA *Title 10, Armed Forces*, Section 1076. The need for the medical care arose out of injuries sustained by the wife, who as a pedestrian was struck by an automobile. The total value of the government medical services was $918, all of which, except for $31.50, plaintiff's

wife was entitled to receive under Section 1076. Additional civilian medical treatment totaled $365, which the insurer paid; and it also offered to pay the $31.50. The Court held as follows:

> "It should not require any extended citation of authority to support a holding that expenses are 'incurred' only when one has become obligated to pay for them. See cases collected in 42 C.J.S. p. 553. The plaintiff here never became liable to pay more than $31.50 for the medical service provided for his wife by the Government and is entitled to no more than this amount under the policy. Irby v. Government Employees Insurance Company (La.), 175 So. 2d 9: United States v. St. Paul Mercury Indemnity Co., 238 F.2d 594; Gordon v. Fidelity & Casualty Company of New York, 238 S.C. 438."
>
> • • • •
>
> "It follows that the plaintiff's rights under the policy are limited to $31.50. Remanded."

In accord with *Gordon* and *Lefebvre* is *Drearr v. Conn. Life Ins. Co.*, 119 So. 2d 149 (Ct. of App., La., Orleans, 1960).

Gordon and *Lefebvre* were lawsuits brought by the insured under an automobile liability policy providing medical payments coverage. However, the United States was likewise denied a recovery for the value of medical care furnished an indigent veteran in *United States v. St. Paul Mercury Indem. Co.*, 238 F.2d 594 (8th Cir. 1956). The United States held an assignment from the veteran of the benefits under his poliomyelitis policy which afforded coverage for "expenses actually incurred". At page 598 the Court held:

> "In any such voluntary assignment made, however, *the Administrator would in any event not be able to obtain more legally than the veteran himself had.* Here, the veteran had a right under his policy to have the insurer pay him only 'for expenses actually in-

curred' by him. And what he was entitled under the statute to have furnished to him as a veteran beneficience, without obligation of any nature on his part therefor, and what he so accepted, could hardly legally be said, we think, to represent 'expenses actually incurred by the Insured'.

" 'Incur emphasizes the idea of liability * * *'. Webster's New International Dictionary. 1 Bouv. Law Dict., Rawle's Third Revision, p. 1531 similarly points to this inherency in its definition of the term incur: 'To have liabilities thrust upon one by act or operation of law * * *' ".

* * *

"The summary of the situation made by the trial court may be repeated: 'The court is impressed with the unreality of the position that Kinnier (the insured) has incurred any expense whose payment by him to plaintiff was ever demanded, insisted upon or even expected by plaintiff. *The claim of any debt on his part for that expense is a sham or pretense. It lacks that quality of 'actuality' which, the policy declares, must characterize the 'incurred expense' to support a recovery by Kinnier from defendant.*"

* * *

"But standing out controllingly in the situation is the fact, emphasized above, that the insured claimed, qualified himself to receive, and accepted, the care furnished him, as a veteran's beneficence under Sec. 706, and so was, under the statute, without any obligation to pay therefor, which could make the value of the care and treatment provided to him at the Veterans Hospital 'expenses actually incurred' by him as an insured."

This same definition given "incur" by the Eighth Circuit in the *St. Paul Mercury* case was given "incur" by the Fifth Circuit Court of Appeals in *Stuyvesant Insurance Company*

of New York v. Nardelli, 286 F.2d 600, 603 (1961) when the Court was construing such word as used in a marine liability policy and said:

> "The term 'incur', when used in policies of insurance, has a fixed legal meaning. 'A debt has been incurred when the contingency upon which the payment depends occurs'."

As the Eighth Circuit noted in the *St. Paul Mercury* case, the United States cannot obtain more legally than the recipient of its medical care could recover; and the foregoing authorities clearly demonstrate that the medical service expenses *not incurred* by the insured could not be recovered by the insured.

THE UNITED STATES IS NOT A SUBROGEE

An analogous situation where the goverment can recover no more than what the recipient of the medical care could recover arises under *U.S.C.A., Title 42, The Public Health and Welfare* Section 2651, p. 63, which authorizes a recovery of medical expense costs by the United States from third-party tortfeasors.

The Court of Appeals of Maryland in the case of *Criterion Ins. Co. v. Starkey*, 231 A 2d 707, 713 (1968), in passing upon a medical payments clause and the definition of the word "incurred" therein, said:

> "In a memorandum prepared for the Congressional staff drafting §2651, it was stated:
>
> > 'The instant bill does not purport to create an independent right in the Government to recover for the injury done to its relationship with the injured person. Instead, it would permit the United States to exercise the rights of such person.

> *** If an injured person has no right to recover for the costs of hospital and medical care furnished by the United States, the United States, as subrogee or statutory assignee of that person, would be unable to recover such costs.' 1962 U.S. Code Cong. & Ad. News, p. 2646.1"

As a foot note to that above quoted, the Court inserted the following:

> "1. We note that, prior to the adoption of §2651, the Department of Justice submitted an opinion on the legality of the proposed bill. The letter, addressed to Hon. Emanuel Celler, of the House Judiciary Committee, was written by Justice Byron R. White, then serving as Deputy Attorney General. In relevant part it stated:
>
> > 'In the drafting of the bill, consideration was given to the fact that in many jurisdictions an assignment of a cause of action for personal injuries (including consequential damages, such as medical expenses) is, in varying degree, either not valid at all or not enforceable directly against the third person tort-feasor, and that frequently a mere partial assignment is not so recognized, even if a total assignment would be. * * *'
> >
> > 'It was, therefore, considered preferable to bottom the basic theory of this legislation on the 'subrogation' concept, one which is universally recognized, understood, and regularly applied by all courts, and which would more closely conform the rights of the United States, and the procedure for their enforcement, to the local law and practice, whatever it might be. It is on this theory that the present bill is framed. * * *' See, 1962 U.S. Code Cong. & Ad. News, pp. 2643-2644."

As persuasive authority to this Court, we refer to an article in *The Insurance Law Journal* for November, 1968 (Number

550, page 853) authored by Hon. Justin Dingfelder, an attorney in the Business and Administration Law Division Office of the General Counsel Department of Health, Education and Welfare of the United States. This attorney agrees with our positions in this case that the United States is not a party to the contract between Busch and USAA, that it has no subrogated interest and has no independent right of recovery for the value of medical services rendered.

United States had a remedy against the third-party tortfeasor under U.S.C.A. Title 42, The Public Health and Welfare, Section 2651. This is the only means intended by Congress for United States to use to get reimbursement of the value of gratuitously rendered medical services. The remedy itself is extraordinary. No health, accident or automobile insurance company or self-insured entity is accorded the same remedy at law for pursuing a negligent third party. Any statute in derogation of the common law must be strictly construed; and it cannot and should not be construed as providing a theory of recovery in our case.

The government in this lawsuit is in effect attempting to assert its cause of action by way of subrogation of itself into the position of its insured. This cannot be done for two reasons.

First, as stated in *Michigan Hospital Service vs. Sharpe*, 339 Mich. 357, 63 N.W.2d 638 (Mich.Sup.Ct. 1954), to-wit:

> "The doctrine of subrogation arises only in favor of one who pays the *debt of another*, and not in favor of one who pays the debt in performance of his own covenants. This right never follows a primary liability. 37 Cyc. p. 374 and the cases cited. Spire vs. Spire, 104 Kan. 501, 180 p. 209. The doctrine is so well understood that we forbear to cite further authorities."

The rendering of medical service by the government to the Busches was the fulfillment of its primary obligation imposed

by statute, ergo no subrogation would follow this liability.

Secondly, the government in attempting to subrogate itself is trying to do what an insurance company or other association cannot do under a medical expense insurance policy or medical service agreement as stated in 44 Am.Jur.2d, Insurance, §1827:

> ". . . Nor, in the absence of a stipulation in the policy . . . [granting a right of subrogation] is an insurance company subrogated, on the payment of an accident policy, to the rights of the insured against the one who caused the injury, since accident insurance, unlike fire insurance, is not an indemnity contract, but an investment contract, in which the *only parties concerned* are the insurer and the insured or the beneficiary."

In 3 Appleman, Insurance Law and Practice, §1675, it is stated that "the general rule is, therefore, that the insurer is not subrogated to the insured's rights or to the beneficiary's rights under contracts of personal insurance, at least in the absence of a policy provision so providing."

THE UNITED STATES IS NOT A THIRD PARTY BENEFICIARY

Petitioner in this case maintains that the government is not a proper third party beneficiary with standing to sue for benefits under a contract to which it was not a party. There are essentially only three types of third party beneficiaries. Of these three, two have been held to be a proper party plaintiff.

In *Republic Nat'l. Bank v. Nat'l. Bankers Life Ins. Co.*, 427 S.W.2d 76 (Tex.Civ.App. — Dallas, 1968), the Court stated as follows:

> "Beneficiaries of contracts to which they are not parties are divided into three classes: (a) donee bene-

ficiaries, (b) creditor beneficiaries, and (c) incidental beneficiaries; and only those falling within the first two categories may enforce contracts made for their benefit. 17A C.J.S. Contracts §519(4), p. 964; Edds v. Mitchell, 143 Tex. 307, 184 S.W.2d 823, 158 A.L.R. 470 (1945); Quilter v. Wendland, 387 S.W.2d 440 (Tex.Civ. App., Houston, 1st Dist. 1965, affirmed Supreme Court 403 S.W.2d 335).

"An incidental beneficiary, one who will be benefited only incidentally by the performance of the contract, cannot maintain an action thereon; an incidental beneficiary acquires, by virtue of the promise, no right either against the promisor or the promisee. 17A C.J.S. Contracts §519(4), pp. 971-973; Farmers State Bank v. First State Bank of Liberty, 317 S.W.2d 768 (Tex.Civ.App., Waco 1958); Mercantile Nat. Bank at Dallas v. McCullough Tool Co., 250 S.W.2d 870 (Tex. Civ.App., Austin 1952, affirmed 152 Tex. 471, 259 S.W. 2d 724); Restatement of the Law, Contracts, §147, p. 176.

"Where a stranger contends that it was intended that the provisions of a contract should inure to his benefit such intention must be clearly apparent. If there is any doubt concerning the intent in this regard as it appears from the contract itself, such doubt should be construed against such intent. Cannon Ball Motor Freight Lines v. Grasso, 59 S.W.2d 337 (Tex. Civ.App., San Antonio 1933, affirmed Supreme Court, 125 Tex. 154, 81 S.W.2d 482), and cases therein cited; Knox v. Ball, 144 Tex. 402, 191 S.W.2d 17, 164 A.L.R. 1453 (1945)."

It is Petitioner's contention that the United States government was neither a donee or a creditor beneficiary under the insurance policy contract in question.

The United States was not a donee beneficiary since it could not be said that it is clearly apparent from the insurance policy that the parties to the contract intended to make a gift

to the United States government especially since the United States was under a prior legal obligation to furnish medical services to the injured in this suit.

The United States government was not a creditor of anyone from whom it could collect the value of the medical services in question in this lawsuit. There was no legal obligation on the part of the insured to pay to the United States government, consequently the government was not a creditor of the insured. Likewise, there was no obligation on the part of United Services Automobile Association to pay the value of the medical services in question to the United States government because there was never a debtor-creditor relationship established between United Services Automobile Association and the United States government as no debt was incurred by United Services Automobile Association in favor of the United States government.

As a general rule it has been stated that:

> "As the beneficiaries who assert rights under a contract become more remote from the contracting parties, as their number increases and their identity becomes less certain and as the interest asserted by them become more complex the greater is the probability that the courts will not sustain suits in their behalf." 4 Corbin on Contracts §779G, 1951

To reach any other conclusion would be to defeat the object of the contract made between Petitioner and Major Busch.

In *Franklin Casualty Insurance Company v. Jones*, 362 P.2d 964, Oklahoma Supreme Court, 1961, the court in construing a policy of insurance essentially the same as the one in question when a doctor filed suit for medical services rendered, the court said in denying the doctor's right to sue, as follows:

> "The general rule is that an action may not be maintained on a contract on the theory that it was made

> for the benefit of the plaintiff, a third party, merely because such third party would be incidentally benefited by the performance of the contract. He must be a party to the consideration or the contract must have been entered into for his benefit, and he must have some legal or equitable interest in the performance . . . in order to entitle him to sue thereon. 13 C.J. 709."

In *Pugh v. Travelers Indemnity Company*, Court of Civil Appeals of Louisiana, 5th Circuit, 1964, 166 So.2d 373, in a suit on a medical payments provision of an automobile insurance policy essentially the same as the one in question, the insurance company defended its failure to pay the medical bills presented by the insured on the ground that all the medical bills were never presented and if it paid part of them and they amounted to more than $1,000.00, it would be liable for the surplus to other parties. In other words, the company contended that where the medical bills amounted to more than the coverage, payment should be withheld until all bills were in and the amounts prorated by the insurance company. In reply to such contention, the court stated that "we find no merit in this contention as the contract of insurance was personal to the plaintiff and there is no privity of contract with a third party."

CONCLUSION

Petitioner believes that its position in this case is not only simple but is founded upon sound logic and legal reasoning as well. To hold that the United States government is a third party beneficiary would be to frustrate the very nature and purpose of the insurance contract in question. Could it reasonably be said that the parties to the contract at the time of its execution intended to insure the United States government? Reason alone would negate such a position since there would be no legitimate purpose for a person in this situation to intentionally insure an entity who was under a prior legal

obligation to furnish free medical services. This in itself is the foundation for the requirement that the expense be incurred by the insured.

The other pertinent language of the contract merely provides for how payment is to be effectuated once the policy provision becomes effective. Simply stated, the Petitioner agreed to pay to the insured or such relative personally or assume to pay their obligation for them under their direction. If the insured had paid his obligation to the entity furnishing the medical service then he could elect to be reimbursed by a direct payment to him. Otherwise, he could elect to have payment directed to whatever person or institution to which he was indebted for those services. Also, the Petitioner would pay the insured's obligation for him if he was incapacitated and could not do it himself.

Upon careful examination of the purpose and scope of the policy it should not be seriously suggested that the United States government was intended to be a beneficiary under the policy.

PRAYER

Wherefore, Petitioner, United Services Automobile Association prays that this Court issue its writ of certiorari to the Fifth Circuit Court of Appeals in the view that this case may be heard and judgment rendered for Petitioner or in the alternative remanded to the trial court for further proceedings.

Respectfully submitted,
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/s/ William R. Smith, Jr.
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CERTIFICATE OF SERVICE

It is hereby certified that all copies of this brief required to be sent to opposing counsel have been sent certified mail, return receipt requested, to the following: Messrs. Robert V. Zener and William D. Appler, Appellate Section, Civic Division, Room 3706, United States Department of Justice, Washington, D.C., 20530; Hon. Seagal V. Wheatley, United States District Attorney, Western District of Texas, Post Office Box 1701, San Antonio, Texas 78206; Messrs. Tinsman & Cunningham, 1907 National Bank of Commerce Building, San Antonio, Texas 78205; and Messrs. Nicholas & Barrera, Frost National Bank Building, San Antonio, Texas 78205, on this 2 day of October, 1970, or that copies were hand delivered to counsel.

WILLIAM R. SMITH, JR.

/s/ William R. Smith, Jr.

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APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 29031

UNITED STATES OF AMERICA, ROBERT H. BUSCH and MRS. MARGUERITE BUSCH,
Plaintiffs-Appellees,

VS.

UNITED SERVICES AUTOMOBILE ASSOCIATION,
Defendant-Appellant,

Appeal from the United States District Court for the Western District of Texas

(July 9, 1970)

Before TUTTLE, THORNBERRY and INGRAHAM, Circuit Judges

PER CURIAM: The minor son of an Air Force officer was struck by an automobile and received treatment for his injuries at government expense, which is provided for by 10 U.S.C.A. §1076. The officer and the United States brought suit on the medical payment provision of the officer's automobile insurance policy, issued by United Services Automobile Association.

At the time of the injury Major Busch had outstanding protection under an automobile liability insurance policy, whereunder in Part II, entitled "Expenses for Medical Services," there was contained the following language:

> "To pay all reasonable expenses incurred within one year from the date of accident for necessary medical, surgical, X-ray and dental services . . . Division 1: to or for the named insured and each relative who sustains bodily injury, . . .(c) through being struck by an automobile or trailer of any type."

In addition, Part II provided that "the limit of liability for medical payments stated in the declaration as applicable to 'each person' is the limit of the company's liability for all expenses incurred by or on behalf of each person who sustains bodily injury as a result of any one accident."

Further, in the portion of the policy entitled "Conditions," the policy provided that "the Company may pay the injured person or any person or organization rendering the services and such payments shall reduce the amount payable hereunder for such injury."

The Company having refused to pay the United States for its outlay of $2223.75, plus penalty a[illegible] reasonable attorneys' fees, as provided for by Texas statute, the government sued, and both parties having moved for summary judgment, the trial court entered summary judgment for the United States, based solely upon its construction of the policy involved.

We conclude that the United States was clearly a third-party beneficiary of the policy issued to the member of the military services for whom the government was required by law to furnish medical service in case of such an accident. We conclude, therefore, that the trial court properly entered summary judgment in favor of the United States.

With respect to the allowance by the trial court of an attorney's fee of $750, we conclude that the trial court had the authority to do this without having a trial as to the amount due for attorneys' fees and without further testimony as to the reasonableness of the fee. The defendant insurance company did not bring to the district court's attention its objection to the fee being computed without hearing evidence. It should not be heard to raise this point now. Moreover we agree with the trial court that it had the power to assess the 12% penalty provided by Article 3.62 of the Texas Insurance Code. We conclude that a person who has a right to sue under the policy, and does so successfully, is a "holder" of the policy within the terms of the Texas statute. See *Republic National Life Insurance Company v. Spillars*, 363 S.W. 2d 373 (Reversed on other grounds). See also *United States ex rel Magnolia Petroleum Company v. H. R. Henderson & Co.*, W.D.Ark., 126 F.Supp. 620.

The judgment is AFFIRMED

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